

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-217937

DATE: November 26, 1985

MATTER OF: Charles E. Jarvi

DIGEST:

An employee who failed to use compensatory time off before the time limit fixed by his agency claims overtime pay. Compensatory time remaining to the credit of an employee after the time limit may not be converted back to overtime unless agency determines that failure to take compensatory time was for reasons beyond employee's control due to exigencies of the service.

Mr. Charles E. Jarvi, a former employee of the Department of the Treasury, requests reconsideration of our Claims Group's denial of his claim for overtime pay for compensatory time accumulated.^{1/} Since the records presented do not establish that overtime work was properly authorized or that compensatory time was accumulated and used within the limits fixed by his agency, he is not entitled to the overtime pay claimed.

Mr. Jarvi was employed as the Chief, Accounting and Payroll Branch, Payroll and Information System, Department of the Treasury, San Francisco, California, during the period December 1978 to December 1980. He claims overtime pay for 165 hours of compensatory time which he believes he had accrued at the time he transferred from the Treasury Department. His claim was denied by the Department for two reasons: primarily because he had not shown that he was expressly ordered to work overtime or that overtime was approved as required by the applicable law and regulation, and secondly, because he exceeded the 80-hour limit on accruing compensatory time and did not use the accrued compensatory time within the 12 pay periods specified under agency regulations.

^{1/} Mr. Jarvi's claim was denied by Settlement Certificate No. Z-2843731 dated February 26, 1985.

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Although the record available is not complete, it appears that overtime and compensatory time records were not kept in accordance with agency regulations prior to August 1980. Mr. Jarvi asserts that his supervisor accepted his claim for compensatory time worked, advising him that there was no limit on the accumulation of such time and no restriction on the period allowed for taking compensatory time off. Mr. Jarvi was chief of a unit in San Francisco and his immediate supervisor at that time was located in Washington, D.C. In August 1980 a new supervisor, upon noting the laxness in overtime procedures, began to apply the overtime and compensatory time rules as required by law and regulations. After that Mr. Jarvi apparently did not accumulate any more compensatory time.

Under the applicable provisions of statute, Federal employees may be compensated for overtime work or, in the alternative, may be given compensatory time for such work only if the overtime has been officially ordered or approved. 5 U.S.C. §§ 5542, 5543. The rules applicable under the Fair Labor Standards Act, which require payment of overtime compensation if an employee is permitted to perform overtime services, are not applicable in this case because Mr. Jarvi occupied a position which was exempt from coverage under that act.

Thus, before August 1980, Mr. Jarvi's supervisor allowed him to claim compensatory time off but did not apply the established procedures for ordering or approving overtime, or the procedures for accumulation and use of compensatory time off. Therefore, the Treasury Department argues that Mr. Jarvi should not be officially credited with the compensatory time he claims. On the other hand Mr. Jarvi argues that overtime and the compensatory time should be allowed under the theory in the Court of Claims decision in Baylor v. United States, 198 Ct. Cl. 331 (1972). In that case the court held that the requirement for ordering or approving overtime would be considered to have been met, even if established overtime procedures had not been followed, if employees are "induced" by their superiors to perform overtime work. But overtime, and thus compensatory time, will not be allowed if there is merely a "tacit expectation" that overtime work will be performed.

The record before us is insufficient to establish whether Mr. Jarvi qualified under the Baylor theory; however, we need not decide this issue. Even if he

originally could have claimed credit for the hours in question, this credit was forfeited since the compensatory hours were not used within the required time limitation. The Treasury Department rules applicable to the accumulation and use of compensatory time provide that no more than 80 hours of compensatory time may be accumulated at any one time and that compensatory time will be used within 12 pay periods of the date in which it is earned. Treasury Department rules also indicated the time allowed and that compensatory time accumulated and not used could not be the basis for later payment of overtime compensation.

As the Claims Group noted, an Office of Personnel Management regulation, 5 C.F.R. 550.114(c), prescribes that compensatory time which cannot be used by the employee during the period authorized by agency regulations will result in payment of overtime compensation if the employee's failure to use the accumulated time off was due to an exigency of the service beyond his control. Since Treasury Department regulations must comply with those issued by the Office of Personnel Management, this provision for payment of overtime compensation in lieu of earned compensatory time is applicable. However, Mr. Jarvi's supervisors at Treasury did not find that he had been prevented from using his accumulated compensatory time within the time period allowed because of an exigency of the service which was beyond his control.

Our decision Mena Marano, B-183246, April 10, 1975, is cited in support of the conclusion that compensatory time is forfeited if not taken within the time period authorized by agency regulations, even if the employee was not aware of that limitation. Mr. Jarvi distinguishes his case because he asked his supervisor about the limitations on compensatory time and was told that there were none, whereas in that case there was no indication that the employee had tried to find out what the limitations were. We cannot agree with Mr. Jarvi that his case is distinguishable on this basis because the fact that an individual receives bad advice concerning the requirement of law or regulations from a supervisor or other employee does not furnish a basis for deviation from the requirements of the applicable law or regulation. We have consistently held that an employee cannot rely on the fact that he was given bad advice in these matters to justify a payment which is otherwise not allowable. Melvin Ackley, 60 Comp. Gen. 417, 419 (1981);

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Petty Officer John R. Blaylock, USN, 60 Comp. Gen. 257, 260 (1981). Therefore, the fact that Mr. Jarvi's supervisor consented to the accumulation of compensatory time in a manner not authorized by Treasury Department regulations does not bind the Department to pay overtime for the improperly credited compensatory time.

Thus, at best Mr. Jarvi accumulated compensatory time in excess of the 80-hour limit and, once accumulated, he did not take the compensatory time off prior to the expiration of 12 pay periods after it had been earned. Since the reason for delay in taking time off has not been found to be beyond his control due to an exigency of the service, the compensatory time was forfeited. In these circumstances Mr. Jarvi does not qualify for any overtime pay on account of the compensatory time credited to him while employed by the Treasury Department.

Milton J. Fowler
for Comptroller General
of the United States